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No. 46

In the Supreme Court of the United States

OCTOBER TERM, 1957

EVERETT D. GREEN, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

SUPPLEMENTAL BRIEF FOR THE UNITED STATES ON REARGUMENT

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I. THE COURT OF APPEALS HAD JURISDICTION TO REMAND THE CASE FOR A RETRIAL ON THE FIRST DEGREE MURDER CHARGE

The Court of Appeals had jurisdiction, pursuant to 28 U. S. C., Section 2106, to reverse the judgment rendered after the first trial and remand the case for such further proceedings "as may be just under the circumstances." Since the Court of Appeals held that, on the evidence presented, the crime committed could only be first degree murder, that court properly concluded that, under the circumstances, the just procedure would be to remand the case for a retrial which was

necessarily limited to the issue of first degree murder.[1] Indeed, as we have noted (original Brief for the United States, pp. 23–24, fn. 5), no other course of action had been suggested by petitioner to that court.

Petitioner now urges that the Court of Appeals lacked jurisdiction so to remand the case because there was no express statutory grant of jurisdiction to direct a new trial on the original charge when the appeal had been from a conviction of a lesser included offense. He contends that "[t]he general grant of power to a federal appellate court to remand for proceedings consistent with its decision should not be interpreted as Congressional disapproval of the majority state court rule" which rule, petitioner alleges, limited retrial to that degree of offense for which the appellant had previously been convicted. (Supp. Brief for Petitioner, pp. 3–4.) But petitioner ignores the fact that, regardless of what the practice in some states might have been,[2] no federal court has ever accepted the limited waiver doctrine and this Court explicitly rejected that doctrine in *Trono* v. *United States*, 199 U. S. 521 (Brief for the United States, pp. 26–27, fn. 6), deciding the case "as if it arose in one of the Federal courts in this country." And it is

[1] In view of the theory on which the reversal was based, the sole alternative would have been to dismiss the indictment, despite the finding of the first jury and the overwhelming evidence of guilt.

[2] In fact, the states are approximately evenly divided in accepting or rejecting the limited waiver doctrine which precludes retrial for the greater offense. Brief for the United States, p. 39.

well established that a new trial, when granted as a result of action by the defendant, sets aside the original verdict and permits such fresh disposition of the case as may be just, including possible increase in sentence if the defendant is again found guilty. See *Bryan* v. *United States*, 338 U. S. 552, 560; *Stroud* v. *United States*, 251 U. S. 15, 18; *Murphy* v. *Massachusetts*, 177 U. S. 155, 158; *United States* v. *Ball*, 163 U. S. 662, 672. There exists, therefore, no basis in federal law for concluding that the power to remand for such further proceedings as may be "just under the circumstances" did not include the power to order retrial for the greater offense.[3]

Petitioner's basic premise that retrial for the greater offense somehow is contrary to accepted concepts of American jurisprudence is a false one. When the double jeopardy provision of the Fifth Amendment was first proposed, there were some who thought it would preclude a retrial even though sought by the defendant,[4] and after the Amendment was adopted, some authorities were of the view that it

[3] Surely, *Carroll* v. *United States*, 354 U. S. 394, which held that the Government could not appeal an order granting a motion to suppress evidence, does not suggest that, in the absence of specific statutory authority, the courts of appeals could not remand cases, appealed by the defendant, for disposition in accordance with accepted federal practice.

[4] As originally proposed by Madison, the provision read "no person shall be subject * * * to more than one punishment or one trial for the same offense." 1 Annals of Congress, 1789–91, p. 433. For a summary of the early history of the double jeopardy provision, see Bigelow, *Former Conviction and Former Acquittal*, 11 Rutgers L. Rev. 487.

precluded appeal by the defendant in a criminal case.[5] English precedents were of no avail because, if an irregularity materially affecting the trial occurred to the injury of the accused, an English court would present the matter to the Crown and a pardon would generally be granted.[6] It was soon agreed that the provision against double jeopardy contained in the Fifth Amendment precluded neither appeal by a defendant nor retrial following reversal of the conviction. And no Federal court has ever held that, on remand, the defendant could not be tried on the original charge or was not subject to the maximum punishment for that offense. See Brief for the United States, pp. 25–47.[7]

Petitioner's argument that, apart from the constitutional question, the Court of Appeals lacked juris-

[5] See, *e. g., United States* v. *Gibert*, 25 Fed. Cas. 1287 (No. 15,294). Another question thought troublesome was whether retrial was permissible where the first jury failed to agree on a verdict. This question too was resolved by the federal courts by allowing retrial. *United States* v. *Perez*, 9 Wheat. 579; see *Wade* v. *Hunter*, 336 U. S. 684, 688–690.

[6] For a discussion of the early American and English practices, see *Commonwealth* v. *Green*, 17 Mass. 515.

[7] The concept that it is not a violation of double jeopardy to try a defendant twice for the same offense, where the second trial is had at his request, is reflected in Section 151 of the Civil Rights Act of 1957, 71 Stat. 634, which provides, in part:

> *Provided further, however*, That in the event such proceeding for criminal contempt be tried before a judge without a jury and the sentence of the court upon conviction is a fine in excess of the sum of $300 or imprisonment in excess of forty-five days, the accused in said proceeding, upon demand therefor, shall be entitled to a trial de novo before a jury, which shall conform as near as may be to the practice in other criminal cases.

diction to remand the case for retrial for first degree murder, is therefore circular. He argues that the Court of Appeals lacked jurisdiction because it had no specific statutory authority and that the power so to remand was not encompassed within its general powers because it was contrary to accepted practice. We have seen, however, that the federal courts have been consistent in allowing retrial for the greater offense, and so the practice would be an unacceptable one only if it violated some specific statutory or constitutional provision. As no such statutory prohibition exists, it is apparent that only the constitutional question is before this Court. For the reasons set forth in our principal brief, pp. 19–54, we urge that that question be resolved, consistently with past precedent and sound reason, in favor of permitting a retrial free of the error which caused the reversal of the first conviction.

II. COLLATERAL ESTOPPEL DID NOT BAR RETRIAL FOR FIRST DEGREE MURDER

Petitioner urges (Supp. Brief, pp. 8–12) that the first jury's verdict, that he was guilty of murder in the second degree, precluded retrial on the first degree murder charge, on principles of collateral estoppel, even though that verdict was returned in the same proceeding and was set aside at petitioner's behest.

In *Yates* v. *United States*, 354 U. S. 298, 336, this Court, speaking of the doctrine of collateral estoppel, stated that it "makes conclusive in subsequent proceedings only determinations of fact, and mixed fact and law, that were essential to the decision." We be-

lieve that by "subsequent proceedings" the Court meant, consistent with the established understanding of the doctrine,[8] not merely proceedings subsequent in time, but new actions, later brought, which are independent of the prior proceedings.[9] The mere fact, relied upon by petitioner (Supp. Br., p. 11), that the two verdicts as to the murder charge were returned at separate trials, does not alter the fact that they relate to a single count of a single indictment in a single continuing proceeding.

Petitioner's position in securing a reversal of the verdict of second degree murder, because the jury was misled by instructions which were erroneous in that they permitted such a verdict, and yet relying upon some finding thought to be implicit in that same verdict is, of course, basically inconsistent.

We recognize that the doctrines of *res judicata* and collateral estoppel are applicable to the criminal law. Thus, for example, we agreed (Brief for the United States, p. 54) that, had there been an acquittal of a charge of arson at the first trial, that judgment, undisturbed by the appeal, might have precluded the Government from later showing that petitioner set the fires. However, since the petitioner was not acquitted, but convicted, of arson at the first trial,[10] and did

---

[8] See Scott, *Collateral Estoppel by Judgment*, 56 Harv. L. Rev. 1, 13.

[9] This was, indeed, the factual situation to which the Court had reference in *Yates*, where the question was whether findings in a denaturalization proceeding estopped the Government in a subsequent Smith Act prosecution.

[10] This case is therefore entirely distinguishable from *Bartkus* v. *Illinois*, No. 39, this Term, and *Hoag* v. *New Jersey*, No. 40, this Term.

not appeal that conviction, strict application of the doctrine of collateral estoppel would conclusively establish only the fact that petitioner *did* start the fires. Of course, on retrial, the Government, having the burden of proving every element of the crime, again proved petitioner's commission of the arson. Our point is merely that if, under the doctrine of collateral estoppel, any fact was conclusively established by the first trial, it would have to be embodied in the only judgment not set aside (the arson conviction) and this was a fact which would certainly not aid petitioner.

Moreover, we submit that, even if collateral estoppel were applicable to a prior, reversed verdict in the same proceeding,[11] petitioner can point to no evidentiary fact found by the first jury which in any way exculpates him and is not a product of the very error of law which led to the reversal on the first appeal.

Petitioner contends (Supp. Br., pp. 9–10) that the verdict of second degree murder established that he had not caused death in perpetrating arson and that

> * * * [i]f an assumption must be made about the minds of jurors, one would have to assume that they correctly rather than incorrectly interpreted the law expounded to them. A correct interpretation of that law would be that the jurors could return a second degree verdict if they found petitioner had, without premeditation, caused death independently of the commission of arson.

[11] But see *Scott*, *id.* at p. 15.

There are, however, two fundamental objections to petitioner's reasoning. First, it flies in the face of his argument, successfully urged upon the Court of Appeals, that the evidence at the first trial, if it proved any crime, proved only the commission of felony murder, *i. e.*, death in perpetrating arson. Thus, the Court of Appeals wrote, in reversing the first conviction (R. 11–12):

> The quoted testimony, which was undisputed, shows beyond peradventure that Bettie Brown's death was caused by the fire in the house in which her body was found. There was ample evidence to the effect that the appellant set the fire. * * * In the present case, as in the *Goodall* case, all the testimony as to what occurred in the burning house pointed to murder in the first degree and nothing else. Hence there was no reason for a second degree instruction, and giving it was at least technically erroneous.

Second, as we have noted (Brief for the United States, p. 23, fn. 4; p. 45, fn. 18), in finding that petitioner was guilty of arson (count 1) and that the victim died as a result of the fire[12] (count 2), the jury found, at the first trial, all the essential elements of first degree murder under the felony murder statute. There is therefore no basic evidentiary fact implicit in the first jury's finding which in any way estopped the Government from proving guilt of felony murder at the second trial. Petitioner can seek to rely only on the fact

[12] There was no evidence to establish that petitioner could have caused the victim's death by any other means and the jury found petitioner guilty of her murder.

of the verdict itself, and this was the product of the very error which led to its reversal.

III. PETITIONER'S OTHER CLAIMS OF ERROR ARE WITHOUT MERIT

1. *Testimony as to the pre-arraignment questioning.*—Some observations concerning this Court's recent decision in *Mallory* v. *United States,* 354 U. S. 449, and its possible application to the facts of this case seem appropriate. In *Mallory,* this Court reversed the conviction of a "19-year-old lad of limited intelligence" (455) (whose trial was delayed for a year because of doubt as to his capacity to understand the proceedings against him (451)) because the confession introduced in evidence was made during a period of extended delay "during which arraignment could have easily been made in the same building" (455). *Mallory,* we submit, presented circumstances crucially different from those of the instant case, for here, neither petitioner nor Judge Bazelon dissenting below on this issue (R. 182–187), dispute the fact that petitioner was unavailable for arraignment during the time he was questioned.

In *Mallory,* this Court wrote (454–455):

> The arrested person may, of course, be "booked" by police. But he is not to be taken to police headquarters in order to carry out a process of inquiry that lends itself, even if not so designed, to eliciting damaging statements to support the arrest and ultimately his guilt.
>
> The duty enjoined upon arresting officers to arraign "without unnecessary delay" indicates that the command does not call for mechanical or automatic obedience. Circumstances may

> justify a brief delay between arrest and arraignment, as for instance, where the story volunteered by the accused is susceptible of quick verification through third parties. But the delay must not be of a nature to give opportunity for the extraction of a confession.

On the facts of this case, see Brief for the United States, pp. 6–11, 56–60, it cannot be said that the law enforcement officials created, designedly or otherwise, the "opportunity for the extraction of a confession." Here the delay in arraigning petitioner was conceded to have been caused solely by his hospitalization and was not brought about by any action of the investigating officers. Cf. *United States* v. *Carignan*, 342 U. S. 36, 44–45.

Moreover, in *Mallory*, the petitioner disclaimed knowledge of anything that happened during the period of the confession (R. 90, No. 521, O. T. 1956), and, at the trial, denied the substance of his confession. Here, petitioner was not only able, on the trial, to recount as to each occasion the substance of what he told the officers (R. 61, 146–147, 148–150), but he testified that what he had told them was the truth "as near as I could" (Tr. 252; 255; 539), and repeated at the trial the same exculpatory story he had told prior to arraignment.

Petitioner contended that, on the morning of May 26, he detected smoke in the basement of the house and saw an unidentified colored man lurking there, who attacked him and stabbed him with a pointed object. According to petitioner, when the assailant left fires were burning in the area and he crawled into

the bathroom, ran some water into the bathtub and put his nose close to the tap so that he could breathe through the smoke. (When the firemen reported to the scene, they found petitioner lying in the bathtub.) This was petitioner's explanation of the origin of the fires, as told to the investigating officers (R. 86, 110) and as he repeated it at the trial (Tr. 495-498, 526–530).

Of course, discrepancies between petitioner's trial testimony and his pre-arraignment statements developed. Four of these are cited by petitioner in his original brief (p. 31, fn. 10) as highly prejudicial,[13] and we shall discuss each of these in relation to petitioner's own testimony at the trial.

The Government sought to establish that petitioner did not tell the investigating officers that Miss Brown had died the night before the fire and prior to his writing the incriminatory letter (admitted in evidence without objection; Tr. 172) which referred to her death. Petitioner claims (Br. 31, fn. 10) that he did tell the officers of her prior death and claims that he was prejudiced because, in summation, "the prosecutor chose to overlook that." The record is to the contrary. Indeed, the reference in summation (R. 152) was not to the testimony of the officers, but rather to petitioner's own testimony at the trial.[14]

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[13] As noted, Brief for the United States, p. 55, fn. 23, three of these instances relate to the questioning on May 28th as to which any objection was specifically waived.

[14] On cross-examination, petitioner testified as follows (Tr. 547–548):

> Q. Now, Mr. Green, ever at any time, either in your first talk with Sergeant Couture, when you next talked

Petitioner also cites, as prejudicial, testimony by the officers to the effect that he initially denied writing any letters. But this fact, as in the previous instance,

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to Sergeant Couture and Sergeant Clarke on the same day, on May 26th, and when you talked to Inspector Kelly and Chief Roberts, and when you talked to Clarke and Couture and Kelly on the morning of May 28th, and when you talked to Dr. Murphy and those other people over there in the late morning hours of May 28th, [the reference is to petitioner's appearance before the coroner's jury] did you ever say that you had found Miss Brown dead; did you?

Mr. FORD. Just a minute. I object to that, particularly as to what is included as of May 26th at the Emergency Hospital and then later at the other. I have no objection to that which includes the 28th, but the 26th I do.

The COURT. The objection is overruled. You may answer the question as asked.

The WITNESS. You say that I never told anybody Miss Brown was dead?

Mr. FLANNERY.

Q. Yes, in substance, that is the answer I want. You never told anyone that, did you?

A. No, I haven't—yes, I had, yes, I had.

Q. Who had you told?

A. I told the four men that were in the dormitory, that were in the room there, not the dormitory, the room there at Gallinger Hospital.

Q. You didn't tell Sergeant Clarke that, did you?

A. No, I hadn't.

Q. You didn't tell Sergeant Couture that, did you?

A. No.

Q. You didn't tell Inspector Kelly that, did you?

A. No.

Q. You didn't tell the deputy coroner when you went over there for the hearing, did you?

A. I saw how things were going.

The COURT. Just answer the question.

The WITNESS. I didn't tell the coroner, no.

was also established by petitioner's own testimony at the trial (R. 149–150).

A third discrepancy relates to the time when the incriminating letter was written. Government witness Kelly testified (R. 73) that Green had said he wrote the letter before he smelled smoke. Sergeant Clarke testified that Green had told him that he had written the letter sometime around midnight (R. 129) and this was consistent with petitioner's trial testimony that he wrote the letter at "approximately 25 minutes to 1:00" (R. 140). Sergeant Couture testified, however (R. 113), that petitioner had told him that "he had written that letter just prior to his detecting the odor of smoke and mailed it." (The fire started at about 7 a. m.) We submit, that on a record which "fairly shrieks the guilt" of the accused (*Lutwak* v. *United States,* 344 U. S. 604, 619), the significance of the single phrase "just prior to" should not be unduly magnified.[15] This testimony was not referred to by counsel in summation[16] and, indeed, no further reference was made to it throughout the remainder of the trial.

Finally, there is only one respect in which petitioner's trial testimony as to his statements to the

[15] This testimony was the only instance of possible prejudice cited in the dissenting opinion below (R. 186).

[16] In fact, the only references to the time the letter was written, made by the government attorney in summation, were (Tr. 577):

> Well, the defendant wrote this letter, by his own admission, ladies and gentlemen, before the fire started. By his own admission, he wrote this letter at 12:35.

and a further reference (Tr. 586) to petitioner's statement that he wrote the letter at 12:35.

officers flatly contradicted their testimony—petitioner denied (Tr. 511) having said that he would blow up the house and blow his brains out before he would be evicted (R. 114, 130). But there was independent testimony by Deputy United States Marshal Cornelius, who sought to serve a notice evicting petitioner the day before the fire, that petitioner had said (Tr. 317): "* * * he didn't want to get put out of there, but if they did put him out of there, they would be sorry." And, in any event, the testimony related only to motive for the crime, otherwise amply established. It did not relate to the actual commission of the crime or the contention most strongly urged by defense counsel, that (contrary to the testimony of the medical experts, R. 27–37) Miss Brown died, not from the fire, but from natural causes. See Tr. 602–604.

Even if it be assumed, therefore, that the introduction of testimony as to the pre-arraignment questioning of petitioner was error, petitioner, having voluntarily repeated the substance of this testimony at the trial, cannot claim that it operated to his prejudice, not merely because the extrajudicial statements were exculpatory,[17] but because petitioner, in effect, ratified them at the trial. Thus, in *Wheeler* v. *United States*, 165 F. 2d 225, 230 (C. A. D. C.), certiorari denied, *sub nom. Patton* v. *United States*, 333 U. S. 829, 830, the court wrote:

> But even if it be said that Patton's contention that his confession was forced from him was not abandoned, so that it was error not to submit to

[17] See *Bram* v. *United States*, 168 U. S. 532; but see *Stein* v. *New York*, 346 U. S. 156, 190–191, fn. 35.

> the jury the question whether he had voluntarily confessed, the error was rendered harmless by the fact that he took the stand in his own behalf at the trial in November, some five months later than the date of the confession which he said was extorted from him by violence, and of his own accord told the jury the story of what happened in the drug store on the morning of June 5th, in all essential respects as it was told in the confession.

Cf. *United States* v. *Wernecke*, 138 F. 2d 561, 564 (C. A. 7), certiorari denied, 321 U. S. 771 (even if seizure improper, defendant's testimony rendered it harmless); *United States* v. *Bayer*, 331 U. S. 532, 540–541.

2. *The Government attorney's rebuttal to the jury.*— Pursuant to the request of the Court at the original oral argument, ten copies of pages 600–605 of the trial transcript, which is a portion of the summation to the jury by defense counsel, were filed with the Clerk. It will be seen therefrom that defense counsel dwelt upon the theme that the consequence of a verdict of guilty was that the petitioner would be electrocuted (there are eight references to "electric chair" or "chair" in the six pages) and stated that "nothing will stop it." (Tr. 600.)

It might also be noted that the conflict between the defense counsel and the prosecutor relating to the role of the jury with respect to the imposition of punishment, evidenced by the summation of defense counsel and the Government's rebuttal, had its origin at the very outset of the trial. At the *voir dire*, the prospective jurors were asked if they were opposed to

capital punishment and the following colloquy took place (Tr. 17–18):

Prospective Juror WEBER. I wouldn't like to take part in sentencing anyone to death. I wouldn't like it on my conscience.

Mr. FORD. May we then at this time, Your Honor, inform this lady that a verdict of guilty in this case—it is mandatory that he go to the electric chair.

Prospective Juror WEBER. It is?

Mr. FORD. Yes, it is. That is the status of this case, that if there is a verdict of guilty, the Court has no choice. There is no one that has any choice but that he must go to the electric chair.

Mr. FLANNERY. But it should be pointed out, too, to the prospective jurors that that is not their function. It is the Court's function to sentence in any case.

Mr. FORD. Oh, yes, I didn't say it was their function, but that must happen. No one can intervene in it, not even the Court.

Now, with the lady juror knowing that, how do you feel now? Would you rather serve or not serve?

The COURT. Could you conscientiously determine the death sentence if you felt the case, by the facts and circumstances shown, required that? If you have any doubt about it, you should say so.

Prospective Juror WEBER. I suppose I could serve.

* * * * *

The COURT. What do you say?

Prospective Juror WEBER. I will serve if I am chosen.

> The COURT. Then there will be no reluctance on your part in finding him guilty, which will require the death penalty, if the facts and circumstances indicate that you should do so, when you understand the law?
>
> Prospective Juror WEBER. Yes, sir.[18]

In addition to the authorities cited, Brief of the United States, p. 65, holding that remarks of Government counsel which would otherwise be prejudicial error must be read with reference to matters raised by opposing counsel's argument, see also *United States* v. *Socony-Vacuum Oil Company*, 310 U. S. 150, 237.

CONCLUSION

For the reasons stated in our original brief and in this brief, it is respectfully submitted that the judgment of the court below should be affirmed.

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[18] The prospective juror was not chosen from the panel.

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